Supreme Court, U. S.
FILED
SEP 24 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-291

PORTER COUNTY CHAPTER OF THE IZAAK WALTON LEAGUE OF AMERICA, INC., *et al.*; THE PEOPLE OF THE STATE OF ILLINOIS, *ex rel.* WILLIAM J. SCOTT, ATTORNEY GENERAL; AND THE CITY OF GARY, INDIANA,
Petitioners,

v.

NUCLEAR REGULATORY COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents,

NORTHERN INDIANA PUBLIC SERVICE COMPANY,
Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR NORTHERN INDIANA PUBLIC SERVICE COMPANY IN OPPOSITION

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TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
STATEMENT	2
ARGUMENT	7
The Court Below Correctly Held That the Commission Acted Within the Scope of Its Jurisdiction	7
CONCLUSION	9

TABLE OF AUTHORITIES

STATUTES:

Atomic Energy Act of 1954, 42 U.S.C. §§ 2133, 2235	7
16 U.S.C. § 47d (Yosemite National Park)	8n
16 U.S.C. §§ 79b(a), 79c(e) (Redwood National Park)	8n
16 U.S.C. §§ 460-u—460u-9 (Indiana Dunes National Lakeshore Act)	7, 8
National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*	9

REGULATIONS:

10 C.F.R. § 2.786	3
10 C.F.R. Part 50, App. D. (now Part 51)	3
10 C.F.R. § 50.34	3

LEGISLATIVE:

112 Cong. Rec. 26,102 (1966)	8

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QUESTION PRESENTED

Whether the Nuclear Regulatory Commission lacks jurisdiction to grant a permit to construct a nuclear power plant on privately owned industrial property because the plant will have minimal effect on an adjacent national park.

STATEMENT

This is the second time this action—to review final orders of the Atomic Energy Commission, now the Nuclear Regulatory Commission, authorizing construction of a nuclear power plant on the southern shore of Lake Michigan—has been before this Court. At the October Term, 1975, the Court, on a petition for writ of certiorari, summarily reversed a decision by the court below that the Commission had not complied with its own regulations (No. 75-4, 423 U.S. 12), and remanded the cause for consideration of the remaining issues.

On remand, the court below, in a unanimous *per curiam* opinion, rejected each of the other challenges to the validity of the Commission's issuance of a construction permit. App. pp. 2-13. The petition for certiorari seeks review of only one of these objections—that the Commission lacked authority to issue the construction permit because the plant will have an environmental impact on the adjacent Indiana Dunes National Lakeshore—an impact which the Commission found would not be substantial and which it concluded did not warrant disapproval of the site.

Because the question presented is a narrow one, and because the Court is already familiar with the proceeding, the relevant facts can be summarized very briefly.

Respondent Northern Indiana Public Service Company (NIPSCO) filed its application with the Atomic Energy Commission for a construction permit for the Bailly Generating Station—Nuclear I (N-1) at its Bailly site on August 27, 1970, together with the Preliminary Safety Analysis Report required by the regulations of the Commission (10 C.F.R. § 50.34). The report was reviewed by the staff of the Commission, and by the statutory Advisory Committee on Reactor Safeguards, in each case with the conclusion that N-1 can be constructed and operated without undue risk to the health and safety of the public. On March 22, 1971, the Environmental Report was filed, pursuant to 10 C.F.R. Part 50, App. D (now Part 51); staff review of environmental matters, including the Report, resulted in a Final Environmental Statement in February 1973. Again the staff concluded that the construction permit should be issued, subject to certain conditions for the protection of the environment.

Hearings before an Atomic Safety and Licensing Board began in October 1972. Some of the present petitioners were among those admitted as Joint Intervenors before the Board. The hearings, which occupied 65 days over a period of 14 months, involved more than 100 witnesses and thousands of pages of testimony and exhibits. After oral argument on proposed findings, the Board issued its Initial Decision authorizing the construction permit on April 5, 1974. App. pp. 65-186. An appeal to an Atomic Safety and Licensing Appeal Board resulted in an affirmance of the Initial Decision on August 29, 1974 (App. pp. 187-219). That decision is the final decision of the Commission (10 C.F.R. § 2.786).

The nuclear plant will be built on NIPSCO's 350-acre Bailly property, which is bounded on the north by Lake Michigan, on the west and the south by Bethlehem Steel Corporation's Burns Harbor plant and on the east by the Indiana Dunes National Lakeshore. NIPSCO currently operates two coal-fired electric generating plants and a gas turbine peaking unit on

the Bailly site. The nuclear facility will be built on the west side of the site (away from the National Lakeshore) between the existing generating plants and the Bethlehem Steel plant. App. pp. 187-188. The Bailly site and the area to the west of it are zoned for and occupied by heavy industry. App. pp. 200-201.

With particular reference to the issue now before the Court, both the Licensing Board and the Appeal Board gave detailed and extensive consideration to the possible environmental effects on the Indiana Dunes National Lakeshore of the construction of the plant. To the contention that construction and operation of the plant will so lower the ground water table as to damage ponds and bogs in the Lakeshore, the Licensing Board found that there would be no dewatering during operation of the plant and that any dewatering during construction would produce only "insignificant effects" on the ponds and would not likely have any effect on the more distant Cowles Bog. In any event, the Licensing Board concluded that NIPSCO's proposal for monitoring ground water levels during construction, and its proposals for mitigating any effects detected during monitoring "will prevent any significant adverse environmental impact to the National Lakeshore." App. pp. 113-117. The Appeal Board agreed. App. pp. 202-203. Moreover, as petitioners note (Pet. p. 10, n. 8), the Commission has subsequently approved a modified construction technique which has a high probability of substantially reducing or eliminating the need for dewatering during construction.

To the contention that the emissions from the cooling tower would create a water vapor plume that would deposit salt residues, and would merge with emissions

from nearby industrial smokestacks to form sulfuric acid mist, to the detriment of Lakeshore plants, the Licensing Board gave a similar answer. With respect to salt deposition, the Licensing Board, noting the uncontroverted testimony that the amounts involved would not have an adverse effect on vegetation, concluded that salt fallout "will have little adverse impact" on Lakeshore vegetation. App. pp. 125-128. With respect to sulfuric acid mist, the Licensing Board, noting that conditions favoring the formation of acid misting are already present at the Bailly site, as a result of existing industrial development and natural atmospheric processes, concluded that the minor addition to atmospheric moisture caused by the cooling tower "will not result in the formation of sulfuric acid that would have an adverse impact at Bailly and its surroundings, including the National Lakeshore [and] Cowles Bog . . . ." App. pp. 119-125. Nonetheless, a monitoring program was required, and remedial action if a significant impact occurred. App. p. 125. Again, the Appeal Board concurred. App. p. 203.

Both the Licensing and the Appeal Boards gave extensive consideration to the visual intrusion of the cooling tower. The tower, which will be visible from some parts of the National Lakeshore, will be 400-450 feet tall, and 440 feet in diameter at its base (about the same height, but of greater diameter than the existing chimney for two fossil fuel units already on the Bailly site), and, in operation, will have a visible vapor plume. The Licensing Board recognized that the tower would be a "visual intrusion" and an "environmental impact." It stated that this impact had been factored into the Board's assessment of alternative

locations and to the cost benefit balance. App. p. 132. In light of all other considerations, it did not believe this impact warranted denial of the construction permit. App. p. 169. Again, the Appeal Board agreed. App. p. 203.

The Appeal Board, in agreeing with the Licensing Board "that the construction and operation of the Bailly nuclear facility will not have significant (if any) direct environmental impact on" the Lakeshore, recognized that Assistant Secretary of the Interior Reed testified to Interior's opposition to the granting of the construction permit. It noted his "generalized unhappiness over the facility's proximity to the Lakeshore" and his two specific objections—that the cooling tower was an "objectionable visual intrusion" and that the inclusion of part of the Lakeshore in the "low population zone" would interfere with management of the Lakeshore by the Interior Department. As to the latter, the Appeal Board corrected Mr. Reed's misunderstanding of the significance of the "low population zone"; petitioners do not challenge the Commission's action on this ground. As to the cooling tower, the Appeal Board agreed with Mr. Reed's characterization of it as seen from the Lakeshore, but agreed with the Licensing Board that this did not preclude the issuance of the construction permit. App. pp. 203-204. The Appeal Board also considered, and rejected, as had the Licensing Board, the contention now presented by petitioners that the legislation establishing the Lakeshore deprived the Commission of jurisdiction to issue the construction permit. App. pp. 204-208.

As already noted, the court below agreed that the Commission acted properly and within its authority in

deciding, notwithstanding Mr. Reed's testimony, that the environmental impact of the plant will not be substantial enough to require disapproval of the Bailly site. App. p. 5.

ARGUMENT

The Court Below Correctly Held that the Commission Acted Within the Scope of Its Jurisdiction

Summarily stated, petitioners' contention is that if and when *any* effect, no matter how insubstantial, will occur to a national park from the construction of a nuclear power plant, the Commission is without authority to authorize its construction. Petitioners take no issue with the Commission's finding that the Bailly facility "will not have significant (if any) direct environmental impact on" the Lakeshore and that such impact will be "negligible"; they assert rather that, significant or no, the impact ends Commission authority.

The assertion is wholly without substance. Congress has vested in the Nuclear Regulatory Commission the authority to issue licenses for the construction and operation of nuclear plants. 42 U.S.C. §§ 2133, 2235. Nothing in the Atomic Energy Act suggests, even remotely, that the grant of authority was limited in the way petitioners suggest.

Nor can petitioners find support for their position in the National Lakeshore Act (16 U.S.C. § 460u-460u-9). Within the boundaries of the Indiana Dunes National Lakeshore, the authority of the Secretary of the Interior is unquestioned, but nothing in either the Act or its legislative history suggests that the Secretary has authority to control land uses beyond those

boundaries.[1] Unlike those occasions when administrative officers have been granted specific authority to take action with respect to surrounding properties,[2] Congress chose to restrict the scope of the Secretary's jurisdiction to the confines of the National Lakeshore and to map the boundaries of that preserve itself. 16 U.S.C. § 460u. This choice was not inadvertent; rather, it was both appropriate and necessary in light of the legislative intent behind the enactment.

Indeed, as the legislative history of the Act reveals, the Lakeshore Act was agreed to, over the opposition of legislators supporting the development of a nearby industrial port (Burns Harbor), only when its proponents agreed that the creation of the Lakeshore would "not stifle economic and industrial development in the vicinity." See 112 Cong. Rec. 26,102 (1966) (Cong. Udall). See also the colloquy between Senators Hartke and Jackson quoted by the Appeal Board (App. p. 206). In sum, the Appeal Board was clearly correct when it stated (App. pp. 207-208):

> "We think the congressional compromise, under which the Indiana Dunes National Lakeshore was

[1] Neither Mr. Reed, the Assistant Secretary for Fish, Wildlife and Parks, nor the Department of the Interior, which was invited but declined an invitation to brief its views, asserted that the Commission lacked authority to license the Bailly plant. App. pp. 204-205.

[2] When Congress has intended to provide the Secretary with authority to take action with respect to lands surrounding park areas, it has done so in definite terms. For example, Congress has given the Secretary the power to modify the boundaries of Redwood National Park and acquire interests in land on its periphery if necessary for its protection. See 16 U.S.C. §§ 79b(a), 79c(e). Similarly, Congress has authorized the Secretary to acquire certain land as part of Yosemite National Park for the specific purpose of "protecting park deer." See 16 U.S.C. § 47d.

> authorized with the understanding that it would be developed 'side by side' with industry in this area of Indiana, precludes our interpreting the Lakeshore Act to prohibit industrial structures on private property solely because they are visible from inside the Lakeshore."

Petitioners also attempt to suggest (Pet. pp. 20-23) that the decisions of the Commission and of the court below sustaining the jurisdiction of the Commission rests upon a grant of authority from the National Environmental Policy Act. Even a cursory examination of the opinions of the Commission and of the court below reveals that the suggestion is without foundation. The authority of the Commission derives, as stated above, from the Atomic Energy Act. NEPA, of course, was applicable, and its mandate was followed, including the mandate that "alternatives to the proposed action" be given consideration. See App. pp. 208-213. The suggestion, however, that the decision below somehow construes NEPA to supersede, or modify, the Lakeshore Act, is wholly baseless.

CONCLUSION

The decision by the court below that the Commission, after full and detailed exploration and consideration of all factors, including environmental effects, if any, on the Lakeshore, was authorized to issue a construction permit for N-1, is clearly correct. There is no conflict of decisions on the issue with this Court or other courts of appeal. The case does not present any important or continuing question of Federal law. Petitioners' challenges to the Commission's decision have already

substantially delayed a project of great importance. The petition for certiorari should be denied.

Respectfully submitted,

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